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No. 93-982

In the Supreme Court of the United States

OCTOBER TERM, 1993

STEPHEN C. VIERRETHER, *Petitioner*,

v.

UNITED STATES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY BRIEF

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Argument

1. Having successfully argued to the Court of Appeals that § 212 of the Coast Guard Authorization Act of 1989 does not apply to Chief Vierrether's case, the government now concedes that it does. Opp. 6. Yet it maintains that he is still entitled to no relief because § 212 does not deprive the Secretary of Transportation of the power to set aside decisions of the Board for Correction of Military Records ("BCMR") even after the statutory 10-month period for final agency action has expired. There are three basic errors in this position.

First, it rests on the mistaken notion that action by the Secretary is required by the record-correction statute, 10 U.S.C. § 1552 (Supp. IV 1992), and that therefore

decisions of the BCMR lack finality unless acted upon by the Secretary. Opp. 7 n.2, 9. The statute simply does not so provide. All § 1552(a)(1) requires is that the Secretary "act[] through boards of civilians."[1] Here, such a board *twice* functioned on the case.[2] Any further review within the Department of Transportation ("DOT") is entirely voluntary on the Secretary's part. It is not required by any Act of Congress and is not otherwise integral to the correction board process, as DOT's own conduct shows.

Thus, the vast majority of cases are not even subject to departmental review following the decision of the BCMR. Pet. 7. This includes cases that involve issues just like those presented by Chief Vierrether's application. If the BCMR had ruled *against* him, rather than *for* him, 33 C.F.R. § 52.64(a)(1) (1993), or if the Coast Guard had recommended the same or substantially the same relief as that which he

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[1] The government cites *Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1982), for the proposition that "Congress directed the Secretary to make the final decision." Opp. 7 n.2. *Miller* does not so hold. At issue was whether the Secretary of the Navy was bound by findings of the Board for Correction of Naval Records ("BCNR") unless they were unsupported by substantial evidence, not whether the BCNR's decision could be final without review by the Secretary. 801 F.2d at 497. The BCNR's regulations, like those of the Coast Guard BCMR, 33 C.F.R. § 52.64 (1993), provide for final agency action without secretarial review in many cases. 32 C.F.R. § 723.6(e) (1993); *see also id.* § 865.18(e) (Air Force).

[2] The government refers to "a preliminary draft decision" as having been referred by the BCMR to the Deputy General Counsel in May 1990. Opp. 3. There were two BCMR decisions, Pet. 8, each headed "Final Decision." Pet. App. 27a, 32a. Refusing even to acknowledge the existence of the first (even though it is in the record), the government claims that the second was handed down in May 1990. This seems doubtful not only because the BCMR was still requesting information from Chief Vierrether's counsel as late as July 20, 1990, but also because the government has represented that it is unable to determine the date of the second decision. Pet. 8-9. A copy of the Justice Department's letter to this effect has been lodged with the Clerk.

requested, *id.* § 52.64(a)(3), there would have been no further review within DOT. The Court need not address the lawfulness of a regulatory scheme which attempts to impose additional layers of review if a citizen wins, but not if he or she loses. The mere fact that, under the regulations, a *denial* of relief in this case would have received no post-BCMR departmental review demonstrates both that such review is not statutorily required and that nothing inherent in the issues dictates such review.

Beyond this, if, as the government claims, there is no "statutory authority to elevate to 'final' status a BCMR recommendation that the Secretary has not approved," Opp. 9, not one of the hundreds upon hundreds of BCMR cases which have received no secretarial review since § 212 took effect would be final even now. Pet. 7. This would mean that the number of cases in which the 10-month rule has been violated would be orders of magnitude greater than we feared. It would also mean that secretarial review was required in the thousands of cases that have been decided by the *other* BCMRs without such review. *See* note 1 *supra*. To accept the government's attempt to finesse the § 212 violation in Chief Vierrether's case would thus open a Pandora's box of issues in a host of other cases.

Because no Act of Congress mandates secretarial review, treating § 212 as mandatory, as the only judges to have reached the question to date have correctly done, violates no competing statutory requirement.

Second, contrary to the government's view, Opp. 9, no inference can be drawn from the fact that Congress failed to include in the Coast Guard Authorization Act of 1993, Pub. L. No. 103-206, 107 Stat. 2419 ("the 1993 Act"), a provision that would have confirmed that § 212 has the effect attributed to it by *Gazlay v. Busey*, 819 F. Supp. 29 (D.D.C. 1993), *appeal pending sub nom. Gottlieb v. Peña*, No. 93-5183 (D.C. Cir.), and *Gottlieb v. Peña*, Civil No. 92-1667 (D.D.C. Apr. 26, 1993), *appeal pending*, No. 93-5182

(D.C. Cir.).[3] As Justice Scalia explain[illegible] in dissent in *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987), there is typically a range of plausible explanations for what Congress does *not* do, including "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter that status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice." His skepticism about inferences from legislative

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[3] Nor is it probative that Congress has provided *in haec verba* that some other type of agency action under an entirely unrelated statutory scheme (the Airline Deregulation Act of 1978) becomes final when a statutory deadline is not met. Opp. 8-9. Whether an agency loses the power to overturn a ruling in a private party's favor when it fails to exercise that power within a statutorily-prescribed period for final agency action requires the kind of statute-specific analysis undertaken by Judge Greene in *Gazlay*. *See* Pet. 16-20. As a result, the government's victory in *Brock v. Pierce County*, 476 U.S. 253 (1986), hardly means that it is entitled to prevail here. The fact that the agency process at issue involves the correction of some earlier adverse action, *see* Opp. 9, is immaterial. Section 212 applies to the *BCMR* process, and not to the Coast Guard's administrative discharge process. Hence, the government's effort to contrast this case with *Pierce County* is unavailing. It also claims that "[i]t is not in the general interest of those seeking [record] corrections to argue that a failure on the part of the BCMR or the Secretary to act within ten months removes the agency's ability to give relief," Opp. 9, mistakenly implying that a ruling for Chief Vierrether might harm others. What others may wish to do if they have received either an adverse BCMR ruling or no decision at all within the statutory 10-month period is for them to decide. They would certainly have the option of (1) waiving any objection on § 212 grounds and hoping for a favorable decision or (2) proceeding directly to district court for review under the Administrative Procedure Act, 5 U.S.C. § 706 (1988), liberated from the duty to exhaust the BCMR remedy (assuming there is such a duty, *see Darby v. Cisneros*, 113 S.Ct. 2539 (1993)). The existence of these options for applicants who have *not* received a favorable decision within the 10-month period is no reason to hold that one who, like Chief Vierrether, *has* prevailed before the BCMR may be deprived of his victory by some untimely *further* review that is not required by any statute.

inaction is sound, *e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *see also, e.g.*, *Girouard v. United States*, 328 U.S. 61, 69-70 (1946), and is confirmed by the history of the 1993 Act.

Section 204 of the bill that became the 1993 Act would have provided, *inter alia*, that decisions of the BCMR are final agency action and not subject to further DOT review 10 months after a complete application has been filed. H.R. 2150, 103d Cong., 1st Sess. § 204(a) (1993). Why it was passed by the House, 139 Cong. Rec. H5538-48 (daily ed. July 30, 1993), is not a mystery. The Committee on Merchant Marine and Fisheries had noted continuing delays in Coast Guard BCMR cases[4] and rejected DOT's suggested changes. H.R. Rep. No. 146, 103d Cong., 1st Sess. 18, 27-28 (1993). The House report makes it clear that the purpose of § 204 was to clarify § 212. *Id.* 17.

The Senate bill contained no corresponding provision, S. 1052, 103d Cong., 1st Sess. (1993), 139 Cong. Rec. S16957, 16986-91 (daily ed. Nov. 22, 1993), and the Senate report is silent on the matter. S. Rep. No. 198, 103d Cong., 1st Sess. (1993). Unrelated differences between the two bills having been worked out informally, the measure passed both houses without a conference report. 139 Cong. Rec. S16991, H10928-46 (daily ed. Nov. 22, 1993). The floor

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[4] The House report refers to one case that had been filed over five years earlier (and which remained pending at the time the Petition was filed). *See* Pet. 11. A decision in that egregious case was finally dislodged earlier this month—more than six years after the officer's application was submitted—but only after a demand was faxed directly to Secretary Peña. It turns out that the BCMR had decided the matter before the summer of 1990. The funereal pace of subsequent review in DOT's Office of General Counsel dramatically illustrates why *Gazlay* and *Gottlieb*, in addition to being legally correct, are absolutely necessary as a practical matter. As long as BCMR decisions compete with matters such as airline mergers for the attention of that Office, members of the Coast Guard can expect to watch in helpless frustration as their careers wither—unless § 212 is enforced.

debates shed no light whatever on either the meaning or the fate of § 204. As enacted, the 1993 Act refers to neither the BCMR nor § 212. 107 Stat. 2419-55.

This legislative path leaves far too much unexplained to permit the inference the government suggests. The Senate's reasoning is a matter of conjecture, as is the House's logic in not insisting on § 204. From what *is* known, one could certainly argue that the fact that Congress did not overturn *Gazlay* and *Gottlieb* is more telling than its failure to codify them, but it is enough for present purposes to recall that "[i]t is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension Benefit Guaranty Corp v. LTV Corp.*, 496 U.S. 633, 650 (1990), *citing United States v. Wise*, 370 U.S. 405, 411 (1962).[5]

Third, given its concession, the government's suggestion that certiorari should be denied even as to the second Question Presented, Opp. 7, is puzzling. The Court of Appeals has yet to address the effect of § 212. The only cases that have done so reached the very conclusion for which Chief Vierrether argues. They are awaiting briefing and argument in the District of Columbia Circuit. The issue is a recurring one because of the Secretary's failure to comply with the 10-month deadline in a significant number of cases, and Chief Vierrether has a right to have it decided on the merits by *some* court. The proper course is not to deny certiorari but to grant, vacate and remand.

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[5] Drawing the inference proposed by the government would also give the Senate power to overturn judicial decisions and thereby make law unicamerally and without presidential assent. The Constitution certainly prohibits this if it were attempted by affirmative act. U.S. Const. art. I, §§ 1, 7, cl. 2-3; *Patterson, supra*; *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 944-59 (1983). *A fortiori*, it is impermissible by *in*action.

2. The Coast Guard's failure to afford Chief Vierrether the trial-type hearing and other important procedural protections conferred by its own regulations cannot be sustained on the basis that an agency can *change* or *modify* its regulations. *Compare* Opp. I (respondent's version of third question), 10. The regulations guaranteeing the right to a hearing were precisely the same before, during and after the program through which Chief Vierrether was discharged. All the Coast Guard did was to announce that the regulations were being "suspended" for those to be RIFed who had more than eight years' service; they remained in force for other personnel with over eight years' service. The fact that Chief Vierrether was not the only victim of the Coast Guard's unlawful "suspension" of the hearing regulations is hardly a defense, as the government implies. Opp. 10.

As the Court of Military Appeals recently observed, "[w]ith regard to administrative-discharge procedures, a servicemember is afforded many due process protections, mostly spelled out in service regulations but having their foundation in the Constitutional principle that no person may be deprived of property without due process of law." *United States v. Gansemer*, 38 M.J. 340, 341 (C.M.A. 1993) (citations omitted). Service regulations such as those the Coast Guard "suspended" are therefore a key source of protection for GIs. Agency adherence to them must be strict, especially since constitutional protections may not apply in the same manner as they do in civilian life. *E.g.*, *Weiss v. United States*, 113 S.Ct. 752, 760 (1994). If service regulations can be applied to some but not to others under the guise of a power of suspension that has no statutory foundation, as was done here, the rights conferred become illusory.

3. Finally, the government's dismissive treatment of the fact that Chief Vierrether was not only "RIFed" but barred from any further military service (and subjected to

reduced civilian employment prospects) disregards the realities of both military and civilian life. It strains credulity to claim that there is nothing derogatory about barring a career Chief Petty Officer with nearly 18 years' service from reenlisting. Opp. 10. Such a bar is in no sense "neutral." If it were, the Coast Guard would not have regulations affording such key rights as prior notice and an opportunity for a trial-type hearing before career personnel can be denied reenlistment. Pet. App. 4-6. Nor are demobilization and a bar to reenlistment simply two sides of the same coin, Opp. 10, as the thousands of GIs who were demobilized after World War II only to be called up again a few years later for the Korean War can attest.

The government cites *Giglio v. United States*, 17 Cl. Ct. 160, 169-70 (1989), and *Keef v. United States*, 185 Ct. Cl. 454, 467-68 (1968), for the proposition that "longevity alone does not justify the imposition of a hearing requirement." Opp. 11. Passing over the fact that the cited portion of *Giglio* is dictum (Sergeant Giglio having been afforded an evidentiary hearing, *id.* at 163), the agency regulations at issue in Chief Vierrether's case acknowledge longevity as a pertinent factor since they confer hearing rights on personnel with over eight years' service. Pet. 4-6.

More fundamentally, the government's comment misses the point. It is not merely that "involuntary release of a senior enlisted man would inevitably raise questions in the minds of prospective employers." Andrew S. Effron, *Punishment of Enlisted Personnel Outside the UCMJ: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 Harv. Civ. Rgts.—Civ. Lib. L. Rev. 227, 254 (1974), *quoted at* Pet. 25. That harm is greatly magnified where, as here, the career servicemember is also barred from reenlisting in the future. Whether or not longevity alone is enough, therefore, longevity plus an RE-4 reenlistment code triggers the due process right to a

hearing.[6]

Conclusion

For the foregoing reasons and those previously stated, certiorari should be granted. The decision of the Court of Appeals should be vacated and the case remanded with instructions to address the effect of § 212 where the 10-month period expires before the Secretary reviews the BCMR's decision.

Respectfully submitted.

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[6] *Keef*, the other case relied on by the government, is inapposite because it involved an RE-*2*, not an RE-*4*. Pet. 24-25. "An RE-4 code is the worst of all because it declares the veteran ineligible to reenter military service of any kind in any capacity." Brief *Amicus Curiae* of Vietnam Veterans of America 3 n.2. "Employers and other members of the community are bound to wonder why someone who had served honorably for nearly 18 years wasn't welcome back for two more. That is what 'stigma' is all about." *Id.* 4.